SUPREME COURT, U. S.

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No. 492

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

CLARENCE BRANDENBERG,
Appellant,

vs.

PEOPLE OF THE STATE OF OHIO,
Appellees.

BRIEF OF APPELLEES IN OPPOSITION TO JURISDICTION

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ISSUES PRESENTED

1. Is *Ohio Revised Code Section 2923.13* unconstitutional, either on its face or as applied in this case?

2. Was there evidence to sustain a conviction under *Ohio Revised Code Section 2923.13*?

STATUTES INVOLVED

Ohio Revised Code Section 2923.13 — Advocating Criminal Syndicalism:

> "No person shall by word of mouth or writing advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book,

paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, willfully and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both."

Ohio Revised Code Section 2923.12 — Criminal Syndicalism:

"As used in sections 2923.13 to 2923.15, inclusive, of the Revised Code, 'criminal syndicalism' is the doctrine which advocates crime; sabotage, which is defined as the malicious injury or destruction of the property of another; violence; or unlawful methods of terrorism as a means of accomplishing industrial or political reform."

STATEMENT OF FACTS

In this case the defendant-appellant made pre-arrangements with a T.V. reporter and a T.V. cameraman for their attendance at a "Ku Klux Klan" rally and meeting held in Hamilton County, Ohio, on June 28, 1964. The rally and meeting were recorded by them on sound film and were broadcast over a local (as well as network) T.V. station outlet. The persons attending the rally-meet-

ing wore robes and hoods with holes for their eyes, and were armed with shotguns, rifles and "another weapon". (T. page 5).

The leader of the group, identified at the trial as being the defendant-appellant (T. pages 10, 11, 17, 40, 41, 45, 46, 56, 57, 70 and 74), wore a red robe and hood and made the following statements to the rally meeting:

> "I would like to — how far is the nigger going to — yeah. Over there. This is what we are going to do to the niggers. I would like to ask — call this — Patrick. A dirty nigger. Send the Jews back to Israel. I'm for it. Let's give them back to the dark — garden. Save America. Bury the niggers. We intend to do our part.
>
> Give us our state rights. Freedom for the whites. Nigger will have to fight for every inch he gets from now on.
>
> This is an organizers meeting. We have had quite a few members here today which are — we have hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups — one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you."

The defendant-appellant was subsequently arrested and indicted for violating *Section 2923.13, Ohio Revised Code (Criminal Syndicalism)*.

The defendant-appellant was indicted in September, 1964, but because of motions, continuances and the taking of numerous depositions at his request, trial was not had until November 28, 1966. As a result of that trial, which concluded on December 5, 1966, the jury returned a verdict of "guilty" on both counts of the indictment.

A Motion for a New Trial was overruled and, thereafter, appellant appealed to the Court of Appeals for the First Appellate District of Ohio, and said Court subsequently affirmed the conviction of the lower court.

Defendant-appellant then appealed to the Ohio Supreme Court, which affirmed the conviction without an opinion.

ARGUMENT AS TO ISSUES NOS. 1 AND 2

It is the contention of the appellees in this matter that the issues involved are of neither great public importance nor are there substantial constitutional issues involved. It is the further contention of the appellees that this case is strictly one of whether or not there was sufficient evidence to support the charges brought against the said defendant-appellant. The case was submitted to a jury on the evidence presented. This verdict was sustained by way of a Motion for a New Trial and an affirmance both in the Court of Appeals and in the Supreme Court of Ohio.

ISSUE NO. ONE

Ohio Revised Code Section 2923.13 has previously been declared to be constitutional in the case of *State* v. *Kassay*, 126 O. S. 177. In a similar criminal syndicalism statute in California, this Court held in *Whitney* v. *California*, 224 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095, that the question of whether or not one attending a Communistic

convention intended to assist in the organization of a Communist Party with knowledge of its unlawful character and purpose is one of fact, a finding of which by the jury, affirmed by the reviewing court, is not open to review by the Supreme Court. The Court further held in that case that freedom of speech, which is secured by the Constitution, does not confer an absolute right to speak without responsibility whatever one may choose, or an unrestricted and unbridled license giving immunity to every possible use of language and punishing those who abuse their freedom. We are not arguing against the bare and fundamental rights of freedom of speech, freedom of the press, freedom of peaceable assembly, etc. Nor are we arguing against the cases of *Gitlow* v. *New York,* 268 U. S. 652; *DeJonge* v. *Cregan,* 299 U. S. 353; *Herndan* v. *Lowry,* 301 U. S. 242; and many others cited which recite that legal premise. It is to be noted that the Supreme Court was not in those cases confining and restricting itself to just that proposition. On the contrary, in the *Gitlow* case the syllabi state:

> "2. Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.
>
> "3. That a State, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime or disturb the public peace, is not open to question.
>
> "6. Such utterances present sufficient danger to the public peace and security of the State to bring their punishment clearly within the range of legislative discretion even if the effect of a given utterance cannot accurately be foreseen.

"7. A State cannot reasonably be required to defer taking measures against these revolutionary utterances until they lead to actual disturbances of the peace or imminent danger of the State's destruction."

And, on page 670 of the Opinion (in *Gitlow*), the Court stated the following, after first upholding the constitutionality of the (New York) statute:

> "This being so (the constitutionality of the statute) it may be applied to every utterance — not too trivial to be beneath the notice of the law — which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibition class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."

In the case of *Bullock* v. *United States,* 265 F. (2d) 683, *certiorari denied* 78 S. Ct. 54, the Court stated that the guarantee of "free speech" does not include the right to persuade others to violate the law. There are too many cases on this subject to cite and here belabor the argument.

It is not argued that the Ohio Legislature was without power to enact *Section 2923.13, of the Revised Code of Ohio* (under the police power), it is argued that it violated the defendant-appellant's rights under the First Amendment.

The fourth syllabus of *State* v. *Kassay,* 126 O. S. 177, upholds the validity of "criminal syndicalism" statutes of

Ohio. Chief Justice Marshall, speaking for a majority of the Court, in upholding the constitutionality of the (criminal syndicalism) statute, cited *People* v. *Most,* 171 N. Y. 423; *Frohwerk* v. *U. S.,* 249 U. S. 204 (at 206); *Gitlow* v. *New York,* 268 U. S. 652; and many others. The law of that syllabus (in *Kassay*) was followed in *Cincinnati* v. *King,* 6 O. O. (2d) 313, and is the law today.

Although some of the states' criminal syndicalism statutes are aimed specifically at doctrines pertaining to the overthrow of the government by force, other states have legislated against any advocacy of crime or violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform. Ohio's statutes fall within the latter group.

It is apparent that almost all of the reported cases, as being supportive of the law on the subject encompassed in this issue, deal with communism, sedition, espionage, and the like. Nevertheless, it is submitted that the principle is the same and, stated in essence, it is, simply, that although the First Amendment prohibits legislation against free speech it does not give immunity for every possible use of language. (*Frohwerk* v. *United States,* 249 U. S. 204).

Since some space has been devoted to a discussion of the "present danger" test, and conceding that the United States Supreme Court has repeatedly declared that the necessity for a valid restriction (to protect the state and its people from crime, violence, terrorism, etc.) does not exist unless the speech is reasonably calculated to cause imminent danger, it is submitted that this matter is not for consideration in determining the validity of the statute; it can arise only at the trial. (*State* v. *Kassey,* at page 186).

The Smith Act was upheld in the case of *Dennis* v. *United States,* 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857.

In the case of *Yates* v. *United States,* 354 U. S. 298, 1 L. Ed. (2d) 1356, 77 S. Ct. 1064, the Court reaffirmed the validity of the Smith Act. In particular, the Court went into the definition of the term "advocate" as used in that Statute. The Court refused to declare the Statute unconstitutional on that term. It went on to define the term "advocate" as not being a mere abstract doctrine but to advocate action. In fact, the Court, in that case, indicated that the term covered the advocacy of a future act rather than a limited terminology of an immediate act.

The Court went on to say at page 1378:

> "the essential distinction is that those to whom the advocacy is addressed must be urged to do something now or in the future, rather than merely believe in something."

The appellant has laid great weight and stress on the case of *Keyishian* v. *Board of Regents,* 385 U. S. 589, 17 L. Ed. (2d) 629, 87 S. Ct. 675. The factual background of that case is completely different from the facts before this Court. The law in question in that case involved administrative rulings and the rights of teachers to teach and what they could teach. The Court said in that case, at page 640:

> "our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned. That freedom is therefore a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools * * * Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

The above certainly is not the factual case nor background of the case currently before the Court. This is not a case of teaching abstract doctrines, or even teaching. This is a case of hooded men with guns and weapons gathering together and being worked up to a pitch to take specific action at a specific time. Using the above terms of the Court, the evidence did not disclose that the defendant was to inquire, to study, to evaluate, or to gain new maturity.

We therefore believe that the Ohio law in question is constitutional under the United States Constitution. There is no doubt in its terminology. Abstract rules and definitions can be read into any statute. We do not believe that the Court is desirous of going into and declaring statutes unconstitutional on remote abstract possibilities which are far from the facts of the case before the Court. The issue is basically one fact, and not the constitutionality of a statute.

As the Court held in *Dennis* v. *United States,* 341 U. S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, at page 516:

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with scrupulous care demanded by our Constitution. But we are not convinced that because there may be borderline cases at some time in the future, these convictions should be reversed because of the argument that these petitioners could not know that their activities were constitutionally proscribed by the Statute."

We therefore respectfully submit that the Ohio law in question is constitutional, in that it violates neither the First nor Fourteenth Amendments, either on its face, or as construed and applied in this case.

ISSUE NUMBER TWO

It is the belief of appellees that there was sufficient proof to sustain the conviction. As set forth in the factual statement, the facts indicate that there were several men at a rally meeting of the "Ku Klux Klan", who were wearing hoods and robes and who were armed with shotguns, rifles, and "another weapon". It was shown that the crime was committed within the territorial jurisdiction of the Court on the date charged and that the defendant was one of the leaders in the group and spoke out on several occasions, with the quotes attributed to him in the factual statement. The defendant was specifically identified as the person making the statements. He was not, as the Court stated in the Keyishian case, supra, inquiring, studying, or evaluating an idea. He was haranguing the group to specific course of action on a specific date, toward violence and unlawful terrorism as a means of accomplishing political reform.

The surrounding facts and circumstances were also considered by the Court and jury. This is not the case of a man by himself in an open desert yelling "fire"; but rather the case of a man in an open crowded theater wing using the same exact word. The jury had every right to consider why the hoods. They also had the right to consider why these men, to whom the defendant was speaking, had shotguns, rifles and another weapon. They also had the right to consider the background and secrecy of this meeting. Using this background, we respectfully submit that it was a jury question to determine whether the words of the defendant-appellant were words which urged men to do something now or in the future, or whether they were words indicating a mere belief in something, or an abstract discussion of something.

Appellant's counsel further states that there was no evidence of the purpose of the group assembled in order

to meet the requirements in the second count of the indictment. A jury can clearly infer the intent and purpose of an individual or group by that person's, or group's, actions.

Certainly with all of the above mentioned background and evidence, plus other evidence at the time of trial, the jury could determine if the group's purpose fell within the terms of the crime charged.

It is respectfully submitted that this cause, having been tried to a jury, it was a question of fact for the jury to determine from the evidence and testimony adduced, whether the defendant-appellant violated the applicable provisions of *Section 2923.13, Ohio Revised Code.* A review of the record will show clearly that the verdict (of the jury) was based upon, and supported in fact by, evidence sufficient in law to establish the guilt of the defendant-appellant.

The import and meaning of the defendant-appellant's words having been submitted to the jury for determination, under the circumstances under which they were made (secret meeting, hooded men armed with guns), and having been thus resolved, it is submitted that counsel's (for defendant-appellant) effort to substitute his understanding or appraisal of that language, in the argument on this appeal, is without meaning or materiality.

The basic question is, was there evidence adduced from which the jury could have reached its verdict even though, as appellant's counsel has stated, other persons might have reached a different verdict? The law is quite clear that where there is some evidence upon which a jury could have reached a verdict that that verdict will not be set aside, unless the finding of the jury is unsupported by any evidence.

CONCLUSION

In conclusion, we respectfully submit that the Court should deny the appeal because:

1. The Statute is not unconstitutional on its face as violative of the First and Fourteenth Amendments.

2. The Statute is not unconstitutional in this case, as applied and construed, as violative of the First and Fourteenth Amendments.

3. There was more than a sufficient amount of evidence to sustain the finding and verdict of the jury.

It is therefore submitted that no substantial questions are presented by the appeal, and that the judgment of the lower courts should be affirmed.

Respectfully submitted,

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